

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. **76-20**

WILLIAM J. WARNER, JR., ET AL,
Petitioners,

versus

BOARD OF TRUSTEES OF THE POLICE PENSION FUND
OF THE CITY OF NEW ORLEANS, AND ITS MEMBERS,
CAPT. ALVIN H. RANKIN, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HENRY L. KLEIN, ESQUIRE
Attorney at Law
1610 Canal LaSalle Building
New Orleans, Louisiana 70112
Telephone: 504 561-1177

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
(a) Introductory Remarks	2
(b) Jurisdiction Over Board of Trustees of Police Pension Fund under §1983	2
(c) Jurisdiction over Trustees of Pension Fund	3
Statutes Involved	5
Statement of the Case	5
Reasons for Granting Writ	7
Conclusion	20
Appendix "A" Fifth Circuit Opinions	1a
Appendix "B" Fifth Circuit Opinion on Rehearing en banc	38a

TABLE OF CASES

Alexander v. Krammer, 363 F. Supp. 324 (1973)	18
Amen v. City of Dearborn, 363 F. Supp. 1267 (1973)	18
Dupree v. City of Chattanooga, 362 F. Supp. 1136 (1973)	18
Harkless v. Sweeney Independent School District, 427 F. 2d 319	13,18
Harper v. Kloster, 486 F.2d 1124 (4th Cir.)	17,20
Kenosha v. Bruno, 412 U.S. 507 (1973)	3,6,8, 9,12,13,14,15,16,17,18

ii
TABLE OF CASES (Continued)

	Page
C. H. Leavell v. Board of Commissioners of the Port of New Orleans, 424 F.2d 764 (5th Cir. 1970)	10
Monroe v. Pape, 365 U.S. 167 (1961)	3,8,12,13,17,20
Muzquiz v. City of San Antonio, 520 F.2d 993, rehearing ____ F.2d 2242 (5th Cir. 1976)	1,2,7
Smith v. Hampton, 360 F.2d 577 (4th Cir. 1966)	19
Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230	16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

WILLIAM J. WARNER, JR., ET AL,
Petitioners,
versus

BOARD OF TRUSTEES OF THE POLICE PENSION
FUND OF THE CITY OF NEW ORLEANS, AND ITS
MEMBERS, CAPT. ALVIN H. RANKIN, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

William J. Warner, Jr., et al, class action plaintiffs,
as petitioners, pray that a Writ of Certiorari issue to
review the judgment of the United States Court of
Appeals for the Fifth Circuit, entered on rehearing en
banc February 27, 1976.

OPINIONS BELOW

The opinions of the Court of Appeal for the Fifth Cir-
cuit are reported in ____ F.2d 421 (opinion of original
panel), ____ F.2d 1006 (order for rehearing en banc,
____ F.2d 2242 (opinion on rehearing). The opinion of
the original panel of the Fifth Circuit and the opinion

on the en banc rehearing were both Per Curiam with *Muzquiz v. City of San Antonio* reported in 520 F.2d 993, ___ F.2d 2234. The District Court dismissed the original action for finding a lack of jurisdiction with no reported opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1975. The judgment on rehearing was entered February 27, 1976. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(A). Introductory Remark.

The issue for review focuses directly on the threshold question of jurisdiction over claims seeking relief under 42 U.S.C. 1983. In examining the requirements of jurisdiction under the 1871 Civil Rights Act, two fundamental questions must be answered and this section shall be so divided: (i) what is meant by the word "person" suable under 42 U.S.C. 1983, and (ii) what relief may be ordered by the courts of the United States to redress deprivation under the statute.

(B). Does A United States District Court Have Subject Matter Jurisdiction Over A Cause Of Action For Equitable Relief, Brought Against The Board Of Trustees Of The Police Pension Fund Of The City Of New Orleans Under 42 U.S.C. 1983?

The decision below, on rehearing, adopted the reasoning of Appellate Judge John C. Godbold in his

dissent from the ruling of the original panel holding that, as an entity or agency of the "municipality", the Board of Trustees of the Police Pension Fund of the City of New Orleans is immune from suits under §1983. The decisions of the Fifth Circuit in this matter leave open the question of what guidelines should be used in evaluating the particular facts surrounding the relationship of a board or agency with a municipality insofar as that relationship bestows on the board or agency immunity from suit under §1983 enjoyed by the municipality itself. *Monroe v. Pape*, 365 U.S. 167, (1961); *Kenosha v. Bruno*, 412 U.S. 507 (1973).

(C.) Does There Exist Jurisdiction Over The Individuals, As Members Of The Board Of Trustees Of The Pension Fund, And If So To What End Does The Court Have Jurisdiction Over The Individual Members?

The decision below, on rehearing, agreed with the reasoning in Judge Godbold's original dissent which held that the action against the individual members is maintainable only for declaratory and injunctive relief and not for any monetary relief. The opinion on rehearing modified the holding under the particular facts before the court by concluding

"... under the peculiar facts of this case, either a mandatory injunction directed against the individual members of the Board, or injunctive and declaratory relief with respect to the statute is tantamount to a money judgment for restitution against the fund, an entity against which relief may not be directed under the

court's §1983 jurisdiction." *Muzquiz v. City of San Antonio*, ____ F.2d 2234

Perhaps the greatest irony of the case is that Judge Godbold, the dissenter whose original opinion was adopted by the majority *en banc*, recanted and joined the new dissenters, thereby making the verdict nine to seven against jurisdiction.

In his self-reversal, Judge Godbold said:

"I now see this issue more clearly, and hopefully can discuss it more clearly than in my earlier dissent. To the extent that anything said in the original dissent is broader than what is here said, *I recede from it.*"

In dealing with the merits, Judge Godbold clearly opened the door to the relief we seek:

"The ultimate result in this case is an over-reaction by the Court *en banc* . . . In summary, I concur in the holding that the Pension Fund is not a person and in the implicit holding that §1983 proscribes suit against the individual trustees for damages.¹ I dissent from the holding that §1983 also proscribes suits against the individual officers for restitution and other equitable relief not in the nature of damages."

¹ We agree. We never asked for "damages", but sought only restitution and equitable relief.

STATUTES INVOLVED

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. 1983

STATEMENT OF THE CASE

Plaintiffs-appellants are policemen who served on the New Orleans Police Force and from whose salaries certain monies were taken for a pension program. According to Louisiana Revised Statutes, Title 33:2281, et. seq. five percent of all policemen salaries were automatically withheld for pension purposes.

Pursuant to La. R.S. 33:2298, however, policemen who did not remain on the force for the entire twenty year period necessary to become eligible for pension *would receive nothing at all.*

In 1967, that statute was amended to provide refunds to those policemen separated from the force subsequent to December 31, 1967, insofar as deductions were made subsequent to that date.

Those policemen who were denied refunds (or partial benefits) filed suit in 1967, alleging both Federal

Question jurisdiction and Civil Rights jurisdiction. That earlier suit survived one jurisdictional attack (277 F.2d 736) but was dismissed on January 11, 1972, for lack of jurisdictional amount. Amendments were not allowed and the dismissal was "with leave to file".

Suit was again filed and the jurisdictional questions were re-examined by District Judge Alvin B. Rubin and on February 1, 1973, the District Court found jurisdiction under 28 U.S.C. 1343(3), as had the Federal District Court in *Walker v. City of Houston*, No. 69-H-168, Southern District of Texas on February 12, 1971.

The matter was set for trial on its merits in November of 1973 when this Court decided *Kenosha v. Bruno*, 93 S.Ct. 2222, at which time the District Court reopened the question of Civil Rights jurisdiction under 42 U.S.C. 1983 and received briefs.

On January 15, 1974, the District Court dismissed the case for lack of jurisdiction, basing its finding under the *Kenosha* ruling handed down by this Court.

Thereafter, class plaintiffs moved for a reconsideration of that decision, on the grounds that the several Supreme Court decisions decided since *Kenosha* made it clear that the *Kenosha* decision was not intended to go beyond the city itself and that *Kenosha* was applicable only where the sole defendant was a municipality or a governmental agency.

That application for reconsideration was denied on April 23, 1974, forever ending plaintiffs efforts at the district level.

On November 13, 1975 a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit, after hearing oral argument, rendered judgment, *per curiam*, stating that this case presented the same jurisdictional issues as *Muzquiz v. City of San Antonio, et al*, Fifth Circuit, 520 F.2d 993, and was controlled by the decision in that case. The decision there held that the trial court's order dismissing the complaint for want of jurisdiction was error.

On rehearing *en banc*, the Fifth Circuit reversed the original panel's decision, and ruled the case void of subject matter jurisdiction under 42 U.S.C. 1983. From that decision, petitioners file this application.

REASONS FOR GRANTING THE WRIT

"The Court took this case *en banc* because it posed questions of jurisdictional importance in the ever-burgeoning area of relief sought under 42 U.S.C. 1983." *Muzquiz v. City of San Antonio*, Fifth Circuit 1976 ____ F.2d 2234, 2235

This statement from the opinion of Fifth Circuit *en banc* accurately characterizes the significances of the basic jurisdictional issues on which petitioners seek review. The threshold question of jurisdiction is not resolved with sufficient clarity to offer any guidelines for determining the boundaries between immunity and liability under 42 U.S.C. 1983. The entire picture fades quickly out of focus when one tries to answer and resolve the questions raised by seven of the judges who, in four separate opinions, dissent either in whole or in part.

In the matter of *Monroe v. Pape*, supra, the U.S. Supreme Court ruled that the city of Chicago was not liable for damages arising out of the actions of its overzealous law enforcement officers where such damages arose from tortious activities. Thus, after the decision of *Monroe v. Pape* there was no civil rights jurisdiction for actions in damages against municipalities. However, many federal courts continue to consider cases funding their jurisdiction on the Civil Rights Act where "equitable relief" was sought.

In the case at bar, for example, the class-plaintiffs do not actually seek "damages" from the individual pocketbooks of the members of the Board, but merely seek the equitable remedy of a mandate requiring the members of the Board of Trustees of the Police Pension Fund to process requests for refunds to those policemen who find themselves receiving no benefits whatsoever.

Thus, the District Court prior to *Kenosha v. Bruno*, supra, found no difficulty in deciding that there was federal court jurisdiction under the Civil Rights Act.

In *Kenosha v. Bruno*, however, the Supreme Court apparently held that actions in equity were as unavailable against municipalities as had been the previously exiled "actions for damages" under *Monroe v. Pape*.

Thus, considering that case alone, class plaintiffs found themselves dismissed from Federal Court.

BOARD OF TRUSTEES: A "MUNICIPALITY" OR NOT?

In first analyzing whether *Kenosha v. Bruno* will deal a final death-knell to the class plaintiffs herein, it seems fundamental that a determination of the real identity of the defendant Board should be made.

At the district level, we argued that the Police Pension Fund was not the alter ego of the city and therefore, would not fall within the purview of *Kenosha*. An analysis of the City's organizational structure shows that the Police Pension Fund was "attached" to the Department of Finance, but was not a part of that department. Indeed, not only was it intended that the Board be separate and apart from the City's Finance Department, but the "attachment" between the two is no more than a liaison for purposes of "providing information," as clearly stated in the City Charter:

"The foregoing boards shall be attached but shall not be a part of the departments, as indicated . . . the responsibilities of the departments with respect to such boards shall be limited to general oversight of their operations for the purpose of providing information thereon to the Mayor, Chief Administrative Officer and the Council."

It can hardly be said that the specific language providing for the separation from the Department and specifically limiting the connexity between the Board and the City can not be disregarded and construed as

creating an agency relationship. In fact, applying the rule of interpretation "*inclusio unius est exclusio alterius*", we must conclude that the City meant to exclude all connexity between the City and the Board, save the limited "general oversight for the purpose (and only the purpose) of providing information" to certain City segments.

In *C. H. Leavell v. Board of Commissioners of the Port of New Orleans*, 424 F.2d 764 (5th Cir., 1970) the New Orleans "Dock Board", as that defendant is known, also claimed to be the *alter ego* of the state, doing so in an effort to spoil Federal jurisdiction. In affirming the District Court's interlocutory ruling against the Board, the Fifth Circuit noted that the Dock Board was specifically granted various *independent* business powers, including the authority to employ legal services and to engage counsel deemed necessary, and thus, was not the city's "alter ego".

In the case at bar, the Police Pension Board has also been specifically granted various powers which usually accrue to independent business entities, as provided by La. R.S. 33:2284:

"... The Board may hold, receive, use, and sell, or dispose of property ... borrow money; issue notes or other evidences of debt; pledge its bonds, securities, or other assets and its revenues for the year then current from whatever sources received for the purposes of paying its obligations promptly or for other purposes; and employ counsel and pay compensation for services rendered."

Clearly, if the legislature sought to expressly give the Pension Board the powers to conduct its business, it meant for it to be an independent entity. Otherwise, the Board could have conducted all of its business under the authority vested in the City of New Orleans.

The fact that the Board of Trustees can sign notes, borrow money, pledge its assets, issue bonds, invest its funds, and select its own Bank (Section 2290) without the approval of the City Council, without the approval of the voters and without the intervention of the Board of Liquidation of the City Debt clearly shows that a debt of the Board is not a debt of the City and a decision of the Board is not a decision of the City.

There simply are too many express powers and too much express authority specifically given to the Board to ignore its independence from the City. The Board is a self-governing independent body, authorized to and capable of making its own decisions and conducting its own affairs. It is not answerable to the City, except for "information" purposes, and having its own decision-making process, it is suable as a separate entity.

Petitioners submit that the Board of Trustees of the Police Pension Fund is no more than a statutorily-created group of trustees vested with independent authorities, powers, and decision-making abilities, completely capable of making decisions, or controlling, managing and administering the Fund as a separate entity, without sufficient connexity to the City to in any way justify a finding that the Pension Board is the "alter ego" of the City of New Orleans. Neither Congress in enacting the Civil Rights Act nor

the Supreme Court in handing down *Kenosha*, meant the word "municipality" to encompass every entity "somehow" affiliated with a public purpose.

The guidelines for determining whether or not a "Board" or "agency" is to be immunized from §1983 liability should favor jurisdiction over the quasi-governmental entity and only absolve the state county, or city itself. The test under state law of "how far removed" the defendant might be should be onerous on the defendant seeking *Kenosha* immunity. If "any link will do", every entity acting "under color of law" will be able to muster up a link to the municipality itself.

We respectfully submit that the *Kenosha* ruling by the United States Supreme Court erroneously and improvidently extended the decision of *Monroe v. Pape* beyond what Congress intended the Civil Rights Act to encompass.

MONROE AND ITS PROGENY

Careful scrutiny of *Monroe v. Pape*, reveals that the pivotal issue there was whether or not Congress intended Section 1983 to give remedy to parties deprived of their rights by virtue of an official's abuse of his position. To this narrow issue, the Supreme Court said "yes." The "damages" considered they were in the form of tort damages, as opposed to the type of equitable "redress" we seek here.

Thus, it is in a completely different context that the Supreme Court dealt with in *Monroe*, and we do not feel that this Court intended to completely eliminate

municipalities (or municipal "boards") from the purview of 1983.

In this regard, we feel that the Fifth Circuit decision of *Harkless vs. Sweeney Independent School District*, 427 F.2d 319 on point. There, the scope of *Monroe v. Pape*, supra, was considered in a case seeking equitable relief only — reinstatement and back pay. This, of course, is not too dissimilar from the equitable relief sought here — refund of monies unconstitutionally held back. In *Harkless*, the Fifth Circuit held that the *ratio decidendi* in *Monroe v. Pape* limited that decision to a cause of action where damages would be sought against a municipality under the tort doctrine of respondeat superior.

Class plaintiffs seek (a) a ruling that the prohibitions in the LSA R.S. 33:2298 are unconstitutional and (b) an order restraining the members of the Board of Trustees from invoking that prohibition as a basis for refusing class plaintiffs refunds, and/or (c) an order in the form of a mandate to the members of the Board, requiring them to return and refund to your class plaintiffs the monies withheld to date as a consequence of LSA R.S. 33:2298.

Such relief would, of course, not require that "damages" be paid by the individual members of the Board, but would require them to take the necessary steps to refund to the class plaintiffs the money held back unconstitutionally.

At first glance, however, it would seem that *Kenosha v. Bruno*, 91 S.Ct. 2222 has thrown out even

the "equitable" side of 1983. And this might be the case if the City of New Orleans were in the case as the only defendant. However, Justice Rehnquist made special note of the fact that the defendants in that case were municipalities and only *municipalities*, and further noted that varying results could come from the fact that an individual "person" was being brought into the *Kenosha* suit, the Attorney General, stating, at 2227:

"We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the jurisdictional questions presented by the intervention of the Attorney General as a party. . . We therefore remand the case for a consideration of these issues."

Thus, *Kenosha* must be limited to the case of only a municipality as a defendant. Otherwise, (a) the Supreme Court would not have remanded that case for further determination of jurisdictional issues with individuals as defendants, and (b) the effect of Section 1983 would be completely undermined, as would be the effect of the Fourteenth Amendment.

It is in this regard that perhaps the greatest care must be given to an interpretation of *Monroe v. Pape* and *Kenosha v. Bruno*. For it is obvious that all matters which are subject to protection under the Civil Rights Act must begin of essence, with an action by a municipal official. It seems that great care must be taken before granting a complete divorce between the "municipality" and the "person" who acts "under color of law." Stated differently, every action susceptible of redress under 1983 must be "under color

of either state, federal or municipal law. And in almost every case the individuals who act "under color of law" are either members of a municipal "administration", "committee", or "board." The fact that the individual defendants in this case have collectively designated themselves as a "board" cannot, and should not, be allowed to obviate the fact that the members of the board are indeed susceptible to jurisdiction under 1983.

What is contemplated herein, is a mandate by the Court, requiring that the Board process refunds to petitioner.

Admittedly, if the City of New Orleans was the sole defendant in the case, and if the City of New Orleans were the custodian and administration of the Pension Fund, *Kenosha* might vitiate jurisdiction. However, the City is not the defendant in the case, nor does the City have custody or control of the Fund.

Anticipating the argument that the City *might* have to bear the financial brunt of this judgment in view of La. R.S. 33:285, we strenuously urge that this connexity between the City and the board is incidental, indirect, and more in the form of a "guaranty", applicable only if the funds being held by the board are insufficient to pay the judgment in favor of class plaintiffs.

We respectfully submit that *Kenosha* was never meant to emasculate §1983 to the extent that *no action to declare a state statute unconstitutional* would lie in a United States District Court. Giving *Kenosha* a broad interpretation, for instance, if a plaintiff's claim

does not reach the \$10,000.00 plateau, who can be sure to obtain the equitable remedy of declaratory judgment and to regain property taken by unconstitutional means? Not the State. Not a city. *Kenosha vs. Bruno* makes this clear. But not the entity which operates under the statute, be it a Board or a commission, or a department? And not the individuals who enforce an unconstitutional statute "under color of law"?

Who then, can a non-\$10,000.00 plaintiff name as a defendant, if *Kenosha* is to be carried beyond the municipality itself?

A persuasive analogy may be drawn from the case of *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, *DECIDED THE SAME DAY AS KENOSHA*. In that case, Section 122 of the Connecticut General Statutes provided that "The Board of Trustees of the University of Connecticut" had the authority to fix tuition payments. At Page 2232, the Supreme Court noted that relief was invoked pursuant to 42 U.S.C. 1983. At Page 2233, the Supreme Court noted that the plaintiffs sought relief in the form of (a) an injunction prohibiting the enforcement of the statute, and (b) an order requiring the Board to refund to the plaintiffs any tuition unconstitutionally collected.

This is exactly what plaintiffs herein seek. Certainly, we do not hope to obtain money judgments against the trustees, but we do feel that the individual trustees, and the Board itself, are both subject to Federal Court jurisdiction where a mandate is sought to return moneys unconstitutionally taken, it seems that New Orleans policemen would sue the Board of Trustees of

the Police Pension Fund for a refund of salary deductions unconstitutionally held back.

Petitioner respectfully submits that *Kenosha* does not foreclose §1983 relief where a Board is the defendant, but only where a municipality is the only defendant.

To the question of *Kenosha's* applicability to the individual board members we now turn.

HARPER v. KLOSTER

In a dispositive ruling for the case, the United States Court of Appeals for the Fourth Circuit recently made clear: (1) that *Kenosha* provides no immunity from suit under §1983 for the individual defendants in their official capacity and (2) that a §1983 suit does lie against the individual defendants here in their official capacity. *Harper v. Kloster*, 486 F.2d 1124. In *Harper*, four black employees of the Baltimore City Fire Department sued the City of Baltimore under §1983 as well as the members of the Board of Fire Commissioners and the Civil Service Commission in their representative capacity. The complaint sought declaratory and injunctive relief against racial discrimination in the appointment and promotion of firemen. While the Fourth Circuit concluded that *Kenosha* required dismissal of the City of Baltimore the Court held that it did not bar a §1983 claim for equitable relief against the members of the Board of Fire Commissioners and the Civil Service Commission in their official capacity. The Court first noted that in *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court had "held that §1983 applied to

municipal officers and employees when damages were sought." The Fourth Circuit then stated:

"... there have been named as defendants *the individuals who constitute the fire board, the body which makes appointments and promotions, and the Civil Service Commission, the body which recruits, tests, prepares and publishes eligibility lists for appointment and promotion. Monroe* holds that jurisdiction attaches as to them and we do not think that *Kenosha* is to the contrary. The decree of the district court will be just as effective if it applies only to the [individual] defendants [in their official capacity], excluding Baltimore City, a municipal corporation, as if Baltimore City were also a defendant." (at 1138)

There thus can be no doubt that the individual defendants here may be sued under §1983 in their official capacity and that *Kenosha* is no bar. Accord: *Amen v. City of Dearborn*, 363 F. Supp. 1267, (1973); *Alexander v. Krammer*, 363 F. Supp. 324, (1973); *Dupree v. City of Chattanooga*, 362 F. Supp. 1136, (1973).

In *Harper*, the district court awarded non-monetary declaratory and injunctive relief. If defendants argue that *Harper* does not extend to monetary relief, their argument must fail because the authorities make clear that back pay may be awarded as part of appropriate equitable relief. That precise question was at issue in *Harkless v. Sweeney Independent School District*, 427 F.2d 319, where ten black teachers sued for reinstatement and back pay, arising from their terminations during the implementation of a school

desegregation plan. In holding that the teachers could sue for equitable relief under §1983 and that reinstatement and back pay were equitable in nature (427 F.2d at 321-23), the Fifth Circuit expressly relied on the Fourth Circuit's *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (1966). For the Fourth Circuit had there stated that the back pay "claim" is not one for damages; it is the integral part of the equitable remedy of reinstatement (360 F.2d at 581 n. 8).

With respect to the school officials' request for jury trial on the back pay issue, the Court in *Harkless* stated:

"Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is *not* a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the position they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement." (427 F.2d at 324)

The question of the availability of injunctive and declaratory relief against the individual public officials is clearly and, petitioners submit, accurately disposed of in the opinion filed by Judge Godbold,

concerning in part and dissenting in part to the opinion on rehearing en banc. In his opinion Judge Godbold would hold that the failure to recognize jurisdiction as to the individual board members, where monetary recovery may result to claimants "has proceeded to give 'Monroe' wider scope than that case was intended to have." *Muzquiz*, supra 2241.

CONCLUSION

In the "Reasons for Granting Writs" petitioners have argued what we felt were the more compelling reasons, namely:

1. Under the facts of the case and under the *Kenosha* rationale, the Court of Appeals extended in error the municipal immunity from §1983 liability as granted in *Monroe* and *Kenosha*, and did so in such a manner as to remove from federal jurisdiction matters previously cognizable in a federal forum.

2. The failure to recognize jurisdiction against the individual members of the Board has created a conflict with the Fourth Circuit ruling in *Harper v. Kloster*, 486 F.2d 1134.

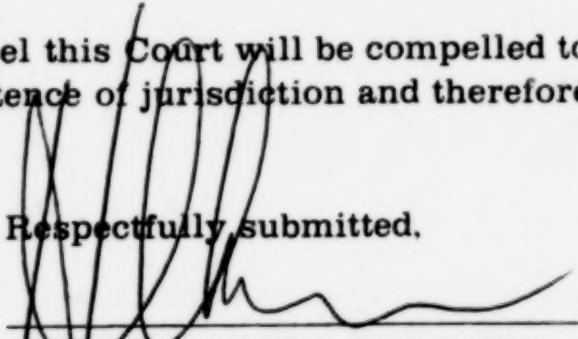
3. The exclusion of individual members of Boards from §1983 jurisdiction of the Federal Courts in cases where the relief sought is the return of property allegedly unconstitutionally held by a Board as an entity has effectively turned §1983 into a right without a remedy.

4. The clear lack of unanimity amongst the members of the *en banc* panel requires Supreme Court adjudication on the very important jurisdictional issues raised.

For the above reasons, and for the reasons evident from the opinion of the Fifth Circuit, writs should issue and the case reviewed.

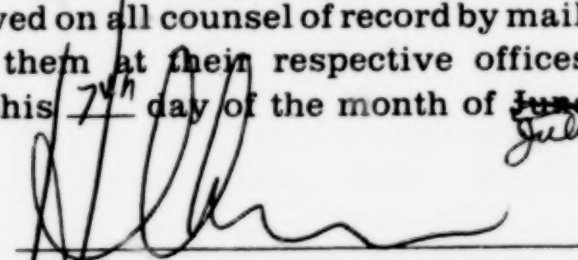
On review, we feel this Court will be compelled to recognize the existence of jurisdiction and therefore grant relief.

Respectfully submitted,


HENRY L. KLEIN, ESQUIRE
Attorney at Law
1610 Canal LaSalle Building
New Orleans, Louisiana 70112
Telephone: 504 561-1177

CERTIFICATE

I certify that a copy of the foregoing application for writs has been served on all counsel of record by mailing the same to them at their respective offices, postage prepaid, this 7th day of the month of ~~June~~ *July*, 1976.


HENRY L. KLEIN, ESQUIRE

APPENDIX A

William J. WARNER, Jr., et al., etc.,
Plaintiffs-Appellants.

v.

BOARD OF TRUSTEES OF the POLICE PENSION
FUND OF the CITY OF NEW ORLEANS, and its
members, Capt. Alvin H. Rankin, et al.,
Defendants-Appellees.

No. 74-2303.

United States Court of Appeals,
Fifth Circuit.

Nov. 13, 1975.

Appeal from the United States District Court for the
Eastern District of Louisiana; Alvin B. Rubin, Judge.

Before TUTTLE, GODBOLD and MORGAN, Circuit
Judges.

PER CURIAM:

This appeal, submitted at the same time as the case
of *Muzquiz v. City of San Antonio et al.*, 5th Cir., 520
F.2d 993 dec., October 8, 1975, presents precisely the
same jurisdictional issues as, and its disposition is
controlled by, our decision in that case.

We hold that the trial court's order dismissing the
complaint for want of federal subject matter jurisdic-
tion was error for the reasons stated by us in the *San
Antonio* case. What we have said on the merits of the
complaint in *San Antonio* may also have disposed of
the claims of the plaintiffs here when the case is sub-
mitted on remand. However, neither party addressed

2a

the merits here so we do not reach the question whether plaintiffs have alleged a state of facts upon which relief could be granted.

The judgment of dismissal is reversed and the case is remanded for further proceedings.

GODBOLD, Circuit Judge (dissenting):

For the reasons set out in my dissenting opinion in *Muzquiz v. City of San Antonio*, 520 F.2d 993, C.A.5, 1975, I would affirm the District Court's finding that there is no § 1983 jurisdiction.

Raymond MUZQUIZ et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN ANTONIO et al.,
Defendants-Appellees.

No. 74-3177

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1975.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, GODBOLD and MORGAN, Circuit Judges:

TUTTLE, Circuit Judge:

Plaintiffs are former San Antonio policemen and firemen who challenge the operation of the city's

3a

Firemen's and Policemen's Pension Fund. The remaining defendants are the Pension Fund Board of Trustees and its members as individual party defendants. Pursuant to Article 6243f of Vernon's Texas Civil Statutes the city of San Antonio maintains a pension fund to which all policemen and firemen are obliged to contribute a portion of their salaries. The pension fund provides death and disability benefits for officers injured in the line of duty, and provides retirement benefits. Should an officer leave public employment before he is eligible for any of these benefits, however, the Act specifically provides:

"[N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from that amount of their pay . . . which money is in itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaries."

Article 6243f, § 19. The plaintiffs filed this class action seeking a refund of the amounts they contributed while they were serving as policemen or firemen in San Antonio.¹

The district court granted defendants' motion for summary judgment, holding that the no-refund

¹ This suit was originally filed as a class action purporting to represent a class of all former policemen and firemen of Houston, Dallas, El Paso and San Antonio; the action was severed into four separate class actions. *Walker v. City of Houston*, 341 F.Supp. 1124 (S.D. Tex. 1971) and each action was held to be properly considered by a single district judge. 341 F.Supp. 1117 (S.D. Tex. 1971).

provisions of Article 6243f were constitutional. The plaintiffs appeal.

I. JURISDICTION

The plaintiffs primarily assert jurisdiction under 42 U.S.C. § 1983, and its jurisdictional counterpart 28 U.S.C. § 1343.² Section 1983 provides:

"Every person who, under color of any statute . . . of any State, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

The Supreme Court has held that the term "person" as it is used in § 1983 does not include municipal corporations, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). Relying on *Kenosha* the district court dismissed the City of San Antonio as a party, but found that jurisdiction would lie against the Pension Fund and its individual board members.

Although the issue is not raised by the briefs of either party, the correctness of the trial court's determination that the Pension Fund Board of Trustees and its individual members are subject to suit under 42

² The plaintiffs also asserted jurisdiction under 28 U.S.C. § 1331. The Stipulations of the parties make it clear, however, that no class member's claim amounts to the \$10,000 needed under § 1331.

U.S.C. § 1983, was raised by the parties at oral argument. In any event, since the question touches on the court's jurisdiction, we consider that it should be disposed of.

The Pension Fund Board of Trustees and the named individuals comprising the Board contend, in a word, that they are immune from suit under § 1983 because they are not "persons", since they are performing governmental functions and that the reasoning by which the Supreme Court in *Monroe, supra*, arrived at the decision that the term "every person" in § 1983 did not comprehend a city, and, later, in *Moor v. County of Alameda*, did not comprehend a county, requires that actual designated persons acting as trustees of a governmental agency also be held not to be comprehended within the word "person" in this statute.

Neither the Supreme Court nor this Court has thus far limited the scope of § 1983. The most comprehensive discussion of the extension of the *Monroe* and later *Kenosha v. Duval County School Board*, 511 F.2d 690 (5th Cir., 1975). In that case a plaintiff sued Duval County School Board in its corporate capacity. The opinion stated, as to the issue relevant to the question now before us:

"Two things should be noted to the argument concerning the far-reaching effect of the district court's decision. First, the issue is not whether the school board can be sued. Personal jurisdiction of the defendants is not questioned. We are confronted only with subject matter jurisdiction, i.e., whether a cause of

action against a school board recognizable in federal courts was created by § 1983. Second, our responsibility is not to decide whether Congress could or should establish such a cause of action, or whether a similar cause of action may exist under some other jurisprudence, but whether Congress in fact did direct a § 1983 cause of action against school boards. Unlike constitutional decisions, our determination here can be corrected by Congress itself if it desires another result.

We can find no controlling distinction between a Florida school board, as a governmental entity, and a Florida municipality or a Florida county, that would suggest that Congress would include one within the purview of the statute, and not the other two. All three find authority for their existence in the Florida Constitution. See F.S.A. Const. Art. VIII, §§ 1 and 2 and Art. IX, § 4. Counties, municipalities and school districts are granted the power in the Constitution to participate in establishing taxes and tax rates for their respective purposes. F.S.A. Const. Art. VII, § 9, which power is exercised by their respective governing bodies. See F.S.A. § 200.011. The legislature has provided each with significant governmental power with which to operate for its respective purposes. See F.S.A. § 125.001 *et seq.* (counties); F.S.A. § 165.01 *et seq.* (municipalities); F.S.A. § 230.01 *et seq.* (school districts).

In an exercise of legislative discretion the Florida legislature has chosen to designate the school board as a 'body corporate' for all purposes, including institution and defense of suits involving official action. See F.S.A. § 230.21. It has similarly chosen to have the governing authority of a municipality or county generally operate in the name of the county or municipality, including suing and being sued as a 'body corporate'. See F.S.A. §§ 125.15, 165.08. Each of these governmental entities, a school district, a county and a municipality, can operate as an entity only through its designated governing authority, the school board, the county commissioners, and the city council. The fact that the Florida legislature has designated the governmental entity to be sued in its own name in two instances and in the name of the governing authority in the third does not change the character of the suit. The suit, however styled, is against the governmental subdivision itself in each case.

We have recently held that the various arms of state government, such as the Department of Highways, are not 'persons' within the meaning of § 1983, *Cheramie v. Tucker*, 493 F.2d 586, 587-588 (5th Cir.), *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974). That decision would seem to follow logically from *Monroe*, *Moor*, and *Kenosha*. All of those precedents dealt specifically with political subdivisions of a state, *i.e.*, municipalities and counties. If the subdivisions of a state were not 'persons' under § 1983, the state itself was obviously not such a 'person' and therefore, the entities through which the state functions should be excluded. An analysis of the approach taken by the Supreme Court in *Kenosha* and *Monroe*, and that

Court's expression of what it views the legislative intent to have been when Congress passed the Civil Rights Act of 1871, seems to require the conclusion that § 1983 was similarly not directed at county school boards."

In the *Adkins* case, the opinion also said: "We have recently decided that a Texas school district which 'under Texas law, is in the nature of a municipality' (emphasis added) is not a 'person' as that term is used in § 1983. *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, 93 n.2 (5th Cir. 1974)".

It is, thus, apparent that our inquiry here is whether the San Antonio Police and Firemen's Pension Fund Board of Trustees has such duties, powers, and purposes as would make it of "the nature of a municipality". If so, then the Board of Trustees cannot be sued under § 1983. If not, then it can.³

While the determination whether the Police and Firemen's Pension Fund Board of Trustees is a "person" within the meaning of § 1983, is a question of federal law, *See Monroe v. Pape, supra*, 365 U.S. at 187-192, 81 S.Ct. 473, the Court must look to the state law to determine the powers and duties and purpose of the entity created. The purposes of this fund are set out above. The City of San Antonio, pursuant to Art. 6243f of Vernon's Civil Statutes maintains a pension fund to which all policemen and firemen are obliged to contribute a portion of their salaries. The named defen-

³ We are here dealing, of course, with the Board of Trustees itself, and not with the individuals who are also named in their individual capacities, with respect to which question we deal later in the opinion.

dants are the trustees of this fund. The Board possesses none of the broad governmental powers which we held to be controlling in *Adkins v. Duval County School Board*. It is not responsible for any broad governmental function, thereby serving the public interest. As statutory trustees, the Board members are responsible only to the beneficiaries of the trust. In sum, while § 21 of Art. 6243f provides that the City of San Antonio is obliged to pay any deficiencies between the money procured under the Act and benefits paid, nonetheless, the Board of Trustees functions as a group of statutory trustees rather than as a governmental body; it partakes of no uniquely governmental responsibilities; it only administers the trust fund. Although not binding on this Court, we think the decision of the Texas Court of Civil Appeals in *Bolen v. Board of Firemen, Policemen & Fire Alarm Operators' Trustees of San Antonio, Texas*, 308 S.W.2d 904, 905, most clearly states the nature of this Board:

"The Board is not the State, nor is it a county, a city, a town or any other political corporation or subdivision of the State. The Board is simply a group of statutory trustees charged with the management of the Pension Funds of the Firemen, Policemen and Fire Alarm Operators of the City of San Antonio."

The Court further said in the *Bolen* case:

"The Board just simply is not a political corporation nor a political subdivision of the State. It does not have any of the attributes of a political subdivision. A political subdivision

contemplates: geographical area and boundaries, public elections, public officials, taxing power and a general public purpose or benefit. The board has none of these attributes . . ."

What seems to be the view of the Texas Court is that pension funds serve an essentially private function. They differ from independent pension funds as set up by other employers or labor unions only in that the beneficiaries are public employees. Such funds could just as well have been set up with the city and employees contributing to a bank or insurance company as trustee, and in that case the identical function would be performed without utilizing public officials as trustees. With this analysis we agree, and conclude that this Board of Trustees is not "like a municipality" and is thus not immune from suit as a "person" under § 1983.

Further, we believe the individual members of the Board are subject to suit under § 1983. There can be no serious question but that they are "persons"; the word has never been suggested to have some arcane meaning whereby some human beings would be "persons" but others would not. Nothing in either *Monroe v. Pape* or *Bruno v. City of Kenosha* suggests that some special meaning should be applied to the term as it is used in § 1983. Indeed, in both *Monroe v. Pape* and *Bruno v. City of Kenosha* the Supreme Court carefully noted that the jurisdictional immunity enjoyed by the two municipalities in the cases was not shared by the individual party defendants.

In *Monroe v. Pape* the Supreme Court reversed a decision of the Court of Appeals for the Seventh Circuit which had dismissed an action for damages against police officers of the City of Chicago. In affirming the dismissal against the city upon the now well-known grounds that the word "person" in § 1983 was to be construed as not including a municipality, the Court said: "Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is reversed." In *Bruno v. City of Kenosha*, a case in which the suit had been filed only against the two cities of Kenosha and Racine, Wisconsin, seeking an injunction, the Supreme Court noted that the Attorney General of the State had intervened as a defendant and remanded the case with respect both to that posture of the case and for further consideration in light of the allegations of the complaint that the suit was based on federal question jurisdiction as well as on § 1983. It was thus clear that the Court was recognizing the right of the plaintiff to maintain his action against the attorney general under § 1983 and against the two cities involved if he established the jurisdictional amount required for federal question jurisdiction under § 1331.

This Court has specifically held that § 1983 actions can proceed against individual party defendants, despite the fact that the ultimate judgment would "surely be felt by the City." *United Farmworkers of Florida Housing Project, Inc. v. City of Del Ray Beach, Florida*, 493 F.2d 799, 802 (5th Cir. 1974); *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, 93, n.2 (5th Cir. 1972). In *Adkins v. Duval County School*

Board, a case seeking reinstatement, back pay and other relief, we stated:

"In all of the cases before us none of the individual members of the three school boards and no officials of the boards were defendants when the cases were dismissed. Had there been individual party defendants, whom this Court has previously held to be 'persons' for the purposes of 42 U.S.C. § 1983, the trial court could not, of course, have dismissed the suits for failure to allege a proper jurisdictional basis."

511 F.2d at 696. We agree with the court in *Harper v. Kloster*, 486 F.2d 1134, 1138 (4th Cir. 1973) when it stated:

"In *Monroe*, nevertheless, the Court held that § 1983 applied to municipal officers and employees when damages were sought. . . . We see no reason to give *Kenosha* any wider application."

In our view, the fact that both *Sterzing* and *United Farmworkers of Florida Housing Project*, *supra*, involved claims principally for injunctive relief is an irrelevant distinction. In *City of Kenosha* the Supreme Court specifically rejected the idea that the nature of the relief sought can affect jurisdiction.

"We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the

generic word 'person' in § 1983 was intended to have a bifurcated application on municipal corporations depending on the nature of the relief sought against them."

412 U.S. at 513, 93 S.Ct. at 2226. In our view, this forecloses the argument that our earlier cases can be limited solely to cases where injunctive relief is sought against municipal city officers.

The argument that the Supreme Court's construction of the word "person" in § 1983 has created a bulwark against any action which might result in making inroads on a city's financial structure is completely answered, it seems to us, by the fact the Court seemed not the least concerned about whether substantial damages against the police officers of the City of Chicago would be paid only out of the pockets of the individual officers or out of appropriations made by the city government, or by their insurers. Moreover, nothing could more clearly demonstrate the fact that the Supreme Court intended merely to construe the language of § 1983 as not comprehending a municipality rather than granting any sort of blanket immunity to a city or a county by its *Monroe* decision. than the Court's treatment of the parties in *Moor v. County of Alameda*, *supra*. In that case the Court held that the County of Alameda was like a municipality and thus not comprehended within § 1983, and that the plaintiff could not sue it under that section; however, in the same opinion, the Court held that the plaintiff, being a non-resident of the State of California, adequately alleged diversity jurisdiction and that the County of Alameda was a *citizen* of the State of California for diversity purposes, and could be sued.

Some confusion seems to have arisen in courts which have not been frequently concerned with interpretation of the Civil Rights Acts to the extent that they seem to have assumed that since the Supreme Court — in *Monroe* — held that a city could not be sued under § 1983, it could not be sued at all in a federal district court. *Moor v. County of Alameda* clearly puts that matter to rest. Moreover, a clear answer to those who contend that *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) gives instruction to the effect that the *Monroe* holding should be expanded to cover municipalities and other governmental entities on some theory of sovereign immunity or protection under the Eleventh Amendment, is some of the language in *Edelman*, itself. In footnote 12 on page 667, 94 S.Ct. on page 1358, the Court said:

“... As may be seen from *Griffin's* [*Griffin v. School Bd.*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256] citation of *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890), a county does not occupy the same position as a State for purposes of the Eleventh Amendment. See also *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). The fact that the county policies executed by the county officials in *Griffin* were subject to the commands of the Fourteenth Amendment, but the county was not able to invoke the protection of the Eleventh Amendment, is no more than a recognition of the long-established rule that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is

not necessarily a state defendant for purposes of the Eleventh Amendment.”

In *Lincoln County v. Luning*, *supra*, the case referred to in the footnote quoted above, the Supreme Court said:

“With regard to the first objection, it may be observed that the records of this court for the last 30 years are full of suits against counties; and it would seem as though by general consent the jurisdiction of the federal courts in such suits has become established. But irrespective of this general acquiescence, the jurisdiction of the circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a state. It was said by Chief Justice Marshall, in *Osborn v. [The] Bank [of the United States]*, 9 Wheat. 738, 857 [6 L.Ed. 204] that ‘the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which the state is a party on the record.’ While that statement was held by this Court in the case of *In Re Ayers*, 123 U.S. 443, 8 S.Ct. 164, [31 L.Ed. 216], to be too narrow, yet by that decision the jurisdiction was limited only in respect to those cases in which the state is a real, if not a nominal, defendant; and while the county is territorially a part of the state, yet politically it is also a corporation created by and with such powers as are given to it by the state. In this respect it is a part of the state only

in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state. *Metropolitan Railroad Company v. District of Columbia*, 132 U.S. 1, 10 S.Ct. 19, 33 L.Ed. 231."

The other case cited by Mr. Justice Rehnquist, writing for the Supreme Court in the above footnote, *Moor v. County of Alameda*, has already been commented on above. It would seem clear, therefore, that none of the considerations of sovereign immunity or Eleventh Amendment immunity from suit should be imported into a court's consideration as to whether this one section of the civil rights acts is to be construed as permitting or denying a plaintiff to sue a particular minor governmental agency or official.

II. CONSTITUTIONAL CLAIMS

The plaintiffs raise a myriad of constitutional challenges to the no-refund provisions of Art. 6243f V.T.C.S. In our view, none of them has merit, and we accordingly affirm the district court's grant of summary judgment.

The plaintiffs claim first that the refusal of the Pension Fund Board to refund their contributions constitutes a taking of their property without compensation, in violation of the Fourteenth Amendment. While earlier cases have termed the benefits due from such a governmental pension fund a "bounty" or a "privilege," and accordingly refused to order payment on the grounds the sovereign could withhold its

gratuities at will,⁴ we do not rely on this distinction between privileges and vested rights. Rather, in our view, there was no "taking" which would require compensation. While the plaintiffs contributed to the Pension Fund, they in turn received protection in the event of death or disability far in excess of their contributions. This protection continued so long as they remained employed as firemen or policemen. They thus enjoyed the benefits of their contributions during their term of employment, and no other compensation is due them.

Similarly their argument that they are entitled to notice and hearing before they can be deprived of property fails.

The plaintiffs also argue that they were denied equal protection inasmuch as other civil servants in San Antonio were not obliged to participate in the same pension program, and further that police and firemen in small Texas cities are not similarly affected by Art. 6243f. While it is true that the plaintiffs were treated differently from certain other public employees, it does not seem to us that this difference in treatment was in any way irrational or a violation of equal protection. Certainly as a class, policemen and firemen in San Antonio cannot be considered as a "suspect class," thus requiring strict scrutiny of the

⁴ See, e. g., *Pennie v. Reis*, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426 (1889); *In Re Goodwin*, 57 F.2d 31 (6th Cir. 1932); *MacLeod v. Fernandez*, 101 F.2d 20 (1st Cir. 1938); *Morgan v. United States*, 115 F.2d 426 (5th Cir. 1941); *Rafferty v. United States*, 210 F.2d 934 (3d Cir. 1954); *Anderson v. United States*, 205 F.2d 326 (9th Cir. 1953); *Stouper v. Jones*, 109 U.S. App.D.C. 106, 284 F.2d 240 (1960).

legislative purposes for the difference in treatment.⁵ Nor could the interest the plaintiffs assert in their contributions to the Pension Fund be thought of as some fundamental personal right.⁶ Absent a suspect classification, or an infringement on some fundamental right, a classification is deemed permissible if it is found to have a "reasonable relationship" to a legitimate governmental interest.

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."

McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

San Antonio policemen and firemen participate in a different pension program than other city employees; they are eligible for substantially greater benefits in the event of death or disability. Other city employees contribute less of their salary, are eligible for refunds, participate in Social Security, and enjoy far fewer benefits. Given the nature of the work of policemen and firemen, this difference in treatment seems eminently reasonable. The Texas Supreme Court has

⁵ The district court properly dismissed such an argument as "absurd." See generally *Developments in the Law — Equal Protection*, 82 Harv.L.Rev. 1065, 1124-27 (1969).

⁶ Among such fundamental rights are: voting, *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); travel, *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); privacy, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and, of course, speech, *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966).

previously construed the pension provisions of 6243f. finding the special treatment of firemen and policemen to be based on the hazardous quality of their work. *Firemen's and Policemen's Civil Service Commission v. Wells*, 157 Tex. 644, 306 S.W.2d 895, 897 (1957). We find the state supreme court's construction of the legislative purpose for the statute convincing.

Similarly the difference in treatment between the policemen and firemen in larger cities from those in smaller cities⁷ can be justified on the basis of the legislature's perception of the differing hazards of the work.

Policemen and firemen in larger cities contribute a more substantial portion of their earnings, and are eligible for far greater benefits. The defendants reasonably argue that the no-refund provisions enable the state to maintain the level of benefits, thereby attracting and retaining qualified officers. While the plaintiffs appear to have conceded the fiscal rationality of the pension statutory scheme, they argue *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) held that a state's protection of its fiscal affairs cannot be used to justify such a statute. The district court properly found *Dandridge* inapplicable, as it involved fundamental rights with the resultant requirement that a state demonstrate a compelling interest in its statutory scheme.⁸

⁷ Art. 6243j does not contain the same no-refund provisions, but applies to cities of population between 150,000 and 400,000.

⁸ The plaintiffs also contend that the district court improperly closed discovery before defendants answered their interrogatories as to the purpose for the no-refund provisions. The legislative intent behind a statute is determined from the language of the Act as well as its legislative history. The plaintiff's interrogatory as to

Finally the plaintiffs argue the no-refund provisions of Art. 6243f affected their constitutionally guaranteed right to travel and also constitute a bill of attainder. Neither argument has any substance. Certainly the plaintiffs were not denied refunds because they wished to travel: they lost their contributions because they resigned their public employment. A bill of attainder is a legislative act inflicting a penalty without a judicial trial. *Cummings v. State of Missouri*, 4 Wall. 277, 18 L.Ed. 356 (1866). No penalty was exacted here, for as we have found the plaintiffs were not deprived of property to which they have a claim.

In sum, the plaintiffs entered into public employment which had as one of its conditions mandatory contributions to the San Antonio Police and Firemen's Pension Fund; Art. 6243f became by its terms an element of their contracts of employment. The no-refund provisions of Art. 6243f are reasonable and, in our view, constitutional.

Affirmed.

GODBOLD, Circuit Judge (dissenting in part).

I do not agree that this § 1983 suit can be maintained against the Board of Trustees of the Pension Fund, that is, the Board as an entity or agency. Nor do I agree that there is jurisdiction under § 1983 against the individual members of the Board for any relief other

legislative purpose called for a legal not a factual conclusion. At the time the district court ruled on the defendants' motion for summary judgment and the plaintiff's cross-motion for partial summary judgment on liability, no material issue of fact remained disputed.

than declaratory and injunctive. I would hold that the only federal jurisdiction is over the individual Trustees of the Pension Fund and then only for purposes of injunctive and declaratory relief. In the exercise of that jurisdiction I would direct the entry of a judgment (against only the individual members) declaring that plaintiffs are not entitled to relief and holding that their prayer for an injunction was properly denied. To that extent, and no more, I agree with Judge Tuttle's opinion on the merits.

In the beginning, it is necessary to correctly identify who the defendants are and what the relief is that is asked. The defendants named in the caption of the complaint are the City of San Antonio, the Board of Trustees of the Pension Fund, and "the members of said Board, individually and in their capacity as members of said Board."¹ The District Court dismissed the action against the city. In the body of the complaint the plaintiffs refer at times to the Pension Fund as a defendant. This ambiguity makes no substantive difference since for purposes of this case the collective Board of Trustees of the Fund and the Fund itself are the same arm or agency of the city.²

Judge Tuttle describes this case as an "action seeking a refund" of amounts contributed to the Pension Fund. I have to say, with deference, that this is an incorrect description. The complaint itself shows the suit to be much more than that. Plaintiffs claimed to be entitled to at least the following:

¹ Seven persons are named as serving in this capacity plus John Does as well.

² However, as discussed below, this ambiguity helps to lay bare the erroneous theory that this is a mere suit against individuals.

(1) A declaration that the Texas statute, Article 6243f, is unconstitutional (A. 61, 74).

(2) An injunction against the enforcement of that statute (A. 61, 74.)

(3) "An accounting, restitution, damages, both general and special, and/or just compensation for the taking of Class Plaintiffs' private property for public use." (A. 61; see also A. 72-75).

(4) "Damages and/or refunds against the above-styled Pension Fund and/or the City of San Antonio, which is the alter ego of said Pension Fund." (A. 62).

(5) The imposition of a constructive trust "on the amount of money in the defendant FIREMEN AND POLICEMEN's PENSION FUND OF SAN ANTONIO, which belongs to Plaintiffs and Class Plaintiffs, equal to the present value of all the money withheld by the Defendants." (A. 69; see also A. 73).

In Section XVI of the complaint, entitled "Restitution," (at A. 70), these forms of relief were requested:

Plaintiffs request this Court for a mandatory injunction compelling the Defendants to give an accounting of all the Plaintiffs' and Class Plaintiffs' contributions and to refund the amount or present value of said contributions plus the value of the money earned by the Defendants on said funds and/or alternatively a reasonable rate of interest, and/or for just compensation to Plaintiffs for the un-

constitutional taking, plus attorney's fees and costs.

(7) Elsewhere plaintiffs request "a single liquid fund judgment" for amounts contributed, money wrongfully earned thereon, costs and attorney fees and any other relief legal or equitable that the court deems just (A. 70).

(8) And elsewhere plaintiffs ask for a judgment justly compensating them for "special damage or injury" under each one of their five alleged causes of action. The alleged "special damages" include "just compensation for taking of Plaintiffs' and Class Plaintiffs' private property for public use," and also such sums at the present value of money as will justly compensate plaintiffs and make them whole, considering that some contributions were made in the 1930's and 1940's in "100 cent dollars" and to include the value or amounts of money earned by defendants on contributions (A. 72-75).

First, as to jurisdiction over the Board of Trustees of the Pension Fund — the governmental entity. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), specifically dealt with the immunity of municipalities, the City of Chicago and the City of Kenosha. Similarly a municipality was involved in *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) where the Supreme Court held that counties were protected by the same immunity. The rationale underlying the grant of immunity, however, has been held to extend to a wide variety of governmental entities. The Circuit Courts

have indicated that the immunity extends to states,³ agencies and departments of the state,⁴ agencies of counties,⁵ agencies and departments of cities⁶ and

³ See, e. g., *Cheramie v. Tucker*, 493 F.2d 586 (CA5), cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974); *U. S. ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (CA3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970); *U. S. ex rel. Lee v. Illinois*, 343 F.2d 120 (CA7, 1965); *Williford v. California*, 352 F.2d 474 (CA9, 1965).

⁴ See, e. g., *Cheramie v. Tucker*, 493 F.2d 586 (CA5, cert. denied, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107 (1974) (state department of highways); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla.*, 493 F.2d 799 (CA5, 1974) (state department of pollution control); *Sykes v. California*, 497 F.2d 197 (CA9, 1974) (state department of motor vehicles); *Burris v. State Dept. of Public Welfare of So. Carolina*, 491 F.2d 762 (CA4, 1974) (state department of public welfare); *Curtis v. Everette*, 489 F.2d 516 (CA3, 1973), cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) (state bureau of corrections); *Coopersmith v. Supreme Court, State of Colorado*, 465 F.2d 993 (CA10, 1972) (state supreme court, court of appeals, district court, state bar association); *Avins v. Mangum*, 450 F.2d 932 (CA2, 1971) (state university); *Zuckerman v. Appellate Division, Second Department, Supreme Court of State of New York*, 421 F.2d 625 (CA2, 1970) (New York Appellate Division); *Rosado v. Wyman*, 414 F.2d 170 (CA2, 1969), rev'd on other gnds., 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (state department of social services); *Clark v. Washington*, 366 F.2d 678 (CA9, 1966) (state bar association). But see *Forman v. Community Services, Inc.*, 500 F.2d 1246 (CA2, 1974), rev'd on other gnds., — U.S. —, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975) (state housing finance agency).

⁵ See, e. g., *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla.*, 493 F.2d 799 (CA5, 1974) (county area planning board); *Robinson v. McCorkle*, 462 F.2d 111 (CA3), cert. denied, 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972) (county hospital).

⁶ See, e. g., *Garrett v. City of Hamtramck*, 503 F.2d 1236 (CA6, 1974) (city planning commission); *Hathaway v. Worcester City Hospital*, 475 F.2d 701 (CA1, 1973) (city hospital); *Lehman v. City of Pittsburgh*, 474 F.2d 21 (CA3, 1973) (city civil service commission); *Henschel v. Worcester Police Department*, 445 F.2d 624 (CA1, 1971) (city police department); *Davis v. U.S.*, 439 F.2d 1118 (CA8, 1971) (city department of public welfare); *U. S. ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (CA3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970) (city hospital *U. S. ex rel. Lee v. Illinois*, 343 F.2d 120 (CA7, 1965) (city police department).

various other governmental entities.⁷ In determining whether the Board of Trustees of the Pension Fund falls within the *Monroe-Kenosha* exception, Judge Tuttle essentially ignores this developed area of federal law. He centers upon the phrase "in the nature of a municipality" used in *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92 (CA5, 1974), with respect to a Texas School district. That phrase is, of course, not a means of analysis but a statement of a conclusion. To reach a decision in this case that the Board of Trustees of the Pension Fund is not "in the nature of a municipality" the majority opinion points out that the Board lacks broad governmental powers and functions. This is not enough. It is true that if a governmental entity, such as a state or city, possesses broad governmental powers and functions it falls within the *Monroe-Kenosha* municipal corporation exemption. But such characteristics, though sufficient to bring an entity within *Monroe-Kenosha*, are not necessary to its being within that exemption. Entities that do not possess broad governmental powers and functions can, and frequently do, fall within the *Monroe-Kenosha* exemption.⁸ In cases involving en-

⁷ See, e. g., *Jorden v. Metropolitan Utilities District*, 498 F.2d 514 (CA8, 1974) (utilities district providing gas, water and sewer services). Compare *Wright v. Arkansas Activities Ass'n*, 501 F.2d 25 (CA8, 1974), where it was held that "a regulatory agency established and supported by local school systems in the State on a voluntary basis" which "was not created by the Constitution or by any statute of the State of Arkansas" was not immune from a § 1983 action.

⁸ See, e. g., *Sykes v. California*, 497 F.2d 197 (CA9, 1974) (state department of motor vehicles); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Fla.*, 493 F.2d 799 (CA5, 1974) (state department of pollution control); *Curtis v. Everette*, 489 F.2d 516 (CA3, 1973), cert. denied, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974) (state bureau of corrections); *Lehman v. City of Pittsburgh*, 474 F.2d 21 (CA3, 1973) (city civil service commission); *U. S. ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (CA3, 1969), cert. denied, 396 U.S. 1046, 90 S.Ct. 696, 24 L.Ed.2d 691 (1970) (city hospital). For other examples see footnotes 3-7, *supra*.

tities lacking such powers and functions, the deciding factor is not the characteristics of the entity viewed in isolation but rather the purposes and status of the entity revealed by analysis of its relationship to the larger governmental body with which it is connected. The inquiry in such a case becomes whether the public body is so connected — administratively, functionally, fiscally, and in other ways — to a state, city or county that it is not suable under § 1983, not because of its characteristics as an independent entity but because it is in effect an arm or agency of the state, city or county.

This court recently reviewed the rationale of *Monroe-Kenosha* and the legislative history of § 1983 on which those cases are based and concluded that much wider groups of entities than simply municipalities are outside the term "person" and, therefore, are not suable under § 1983. *Adkins v. Duval County School Board*, 511 F.2d 690 (CA5, 1975).⁹ In reviewing our prior decisions, we noted that municipalities, counties and states certainly fall within the *Monroe-Kenosha* immunity. Furthermore, since the "state itself [is] obviously not . . . a 'person' . . . , the entities through which the state functions should be excluded." 511 F.2d at 693. Consistent with this analysis, since the City of San Antonio is obviously not a "person," the Board of Trustees of the Pension

⁹ See Comment, Suing Public Entities Under the Federal Civil Rights Act: *Monroe v. Pape* Reconsidered, 43 U. Colorado L. Rev. 105, 111 (1971): "[I]t has even been suggested that the holding in *Monroe* should apply only to cities, counties and parishes. However, this attempt to distinguish *Monroe* cannot be rationally supported within the framework of that case. The *Monroe* decision was based on the legislative history of the Civil Rights Act . . . and the reasoning of the Court would require the same result no matter what type of governmental entity was being sued."

Fund, as an entity through which that city functions, should be excluded from the term "person."

There is a close connection between the City of San Antonio and the Pension Fund and the Board of Trustees thereof. The Board of Trustees consists of the mayor of San Antonio, two aldermen, councilmen or commissioners of San Antonio, two active San Antonio firemen and two active San Antonio policemen. Vernon's Ann.Civ.St. art. 6243f, § 2. Beginning August 1, 1963, the City of San Antonio was required to pay into the Fund sums of money (varying from \$30,000 to \$40,000 per month) until "the Board notifies the city that the Fund is actuarially sound." Vernon's Ann.Civ.St. art. 6243f, § 4. The city pays in an amount matching the sums deducted from the salaries of firemen and policemen. Vernon's Ann.Civ.St. art. 6243f, § 4. In addition the city contributes all sums collected from parking meters. Vernon's Ann.Civ.St. art. 6243f, § 16. The city is additionally authorized to contribute money to the Fund from other sources. Vernon's Ann.Civ.St. art. 6243f, § 16. The Treasurer of San Antonio is specifically designated to be the Treasurer of the Fund, collecting all money paid into the Fund and, on the basis of a monthly written list from the Board, paying out benefits. Vernon's Ann.Civ.St. art. 6243f, §§ 5, 6. Any deficiency between the money procured by the Fund and the amount of the payments made out of the Fund is paid by the City of San Antonio. Vernon's Ann.Civ.St. art. 6243f, § 21.

The extent of this administrative, functional and fiscal interrelation compels the conclusion that the Board of Trustees of the Pension Fund is in essence an arm of the city. The non-municipal character of the

Board of Trustees, discovered by the majority on this appeal, was neither revealed by nor claimed by the plaintiffs below. To the contrary, plaintiffs in their complaint described the city as the alter ego of the Fund (A. 61, 62). They also alleged that the Pension Fund "operates for the benefit of and *under the direction* of the City of San Antonio." (A. 66) (emphasis added). In the face of the revealed facts and plaintiffs' claims, to view the Board as an independent, non-governmental entity for § 1983 purposes overlooks the interrelationship between Fund and city and does violence to the concept of municipal corporation immunity discussed in *Monroe* and *Kenosha*. This is not to say that every public entity performing some function that a larger and related governmental entity might perform enjoys *Monroe-Kenosha* immunity. Necessarily a body of federal law must develop on a case-by-case basis, and, indeed, that process is already well under way. See footnotes 3-8, *supra*.

The majority describe the function of the Fund as "essentially private," pointing out that what it does could be as well performed by a non-governmental agency such as a bank or an insurance company. This is a dubious distinction at best, since many functions actually performed by cities — garbage collection and operation of hospitals, for example — can be, and at times are, contracted out to non-governmental agencies or left to the private sector. The Eighth Circuit has recently declined to "import the often nebulous distinction between the proprietary and governmental functions of a municipal corporation into the federal law question of its civil liability under § 1983." *Jorden v. Metropolitan Utilities District*, 498 F.2d 514 (CA8, 1974). The term "private [versus "public"] ac-

complishes by a semantical device essentially the same importation.

Judge Tuttle relies upon language drawn from a Texas decision.¹⁰ This decision, concerned with Texas constitutional provisions which restrict the types of investments that can be made by the state, counties, cities, towns and other political corporations and subdivisions, involved considerations of state policy and precedent largely unrelated to the question before us. Federal courts must make their own decisions, based upon federal law, of the status of a governmental agency as a "person" under 42 U.S.C. § 1983. Unless we cling to the rudder of the Supreme Court in *Monroe* and *Kenosha*, we will find ourselves lost in a sea of state court decisions concluding that various public entities are or are not "governmental entities" for purposes of some particular state constitutional or statutory provisions. State court decisions may guide us in understanding, as a factual matter, the purposes, functions and status of the entity in question. But this court, in resolving the legal issue of *Monroe-Kenosha* immunity, must take direction from the multitudinous body of federal law, cited above,¹¹ which has addressed this precise question. No state court, however well respected, can override the body of federal law that guides us with respect to § 1983.

Second, I turn to the majority's theory that there is jurisdiction over the individual members of the Board of Trustees with respect to all types of relief sought. I believe there is jurisdiction to grant injunctive and

¹⁰ *Bolen v. Board of Firemen, Policemen & Fire Alarm Operators' Trustees of San Antonio, Texas*, 308 S.W.2d 904 (Tex. Civ.App., 1957 (Writ Ref.))

¹¹ See footnotes 3-8, *supra*.

declaratory relief against the Trustees but no more than that.

Obviously the Trustees are "persons" in the sense that they are human beings. But before drawing any conclusions about the Trustees' amenability to suit, one should consider what is really at stake in this litigation. Upon piercing the veil — indeed there really is no veil — it is easy to perceive what the plaintiffs have in mind. In seeking an accounting, restitution, refunds, damages for wrongful taking, and imposition of a constructive trust, plaintiffs are striking directly for the pocket of the Pension Fund. It is perfectly apparent, for example, that the constructive trust is not sought to be imposed on a fund in the individual pockets and bank accounts of the individual Trustees, but upon the assets of the Pension Fund.¹² The minimum that plaintiffs want in this case is a judgment enforceable against the assets of the Pension Fund through the medium of a judgment naming as judgment debtors the members of the Board of Trustees.¹³ This case is quite different from those situations in which plaintiffs have brought damage actions in order to hold officers personally liable for maladministration or abuse of their positions. See, e. g., *Wood v. Strickland*, ___ U.S. ___, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492, 505 (1961). Although a federal court has jurisdiction to hear such claims, none

¹² In fact, that is what the complaint specifically asks.

¹³ As already pointed out, some of the claimed relief is specifically asked against the Pension Fund itself, and the Fund is described as a "defendant."

appear to be raised in the complaint before us. The Trustees' presence here is purely nominal.¹⁴

In *Warner v. Board of Trustees of the Police Pension Fund of the City of New Orleans*, No. 74-2302, a companion case pending before this panel, plaintiffs raised substantive claims like those in the instant case, but they eschewed any charade of "individual liability" of Trustees and met head-on the situation as it really existed. They explicitly stated that they did not desire a judgment against Board members as individuals and had no intent that the Board member defendants ever suffer personal liability. Rather, they said, they desired a judgment that would force the Board members to serve as conduits for the processing of claims that would be paid out of the pension fund and from no other source. The District Judge in that case treated the suit as just what it was, one in which the only claim against the trustees in their official capacities was a prayer for a declaration that would have the effect of requiring the Board to make refunds.¹⁵ The instant plaintiffs have made no such affirmative disclaimer, but their target is unmistakable. One need only read the complaint.

I agree with the Eighth Circuit's recent statement that "individuals and associations acting under color of state law are not immune to the sanctions of the Civil Rights Acts and may be sued, *unless it is clear to*

¹⁴ For example, relief is claimed for a period of time extending back to the 1930's. It is obvious that there have been numerous predecessor trustees for whose acts the present members of the Board could not be held responsible.

¹⁵ The plaintiffs in *Warner* also sought a declaration as to the constitutionality of the statute. There, as here, § 1983 jurisdiction exists to enter such a declaration.

the court that the claim is actually a ruse by which personal jurisdiction over the state is sought to be exercised." *Keckeisen v. Independent School District* 612, 509 F.2d 1062, 1064 (CA8, 1975) (emphasis added). Such a ruse is before us today. The kind of attack on the public fisc that is represented by *Warner* and by this case strikes at the core of what was discussed in *Monroe* and *Moor v. County of Alameda*, *supra*. Both of those decisions traced the legislative history of the Civil Rights Act and found compelling indications that "Congress did not intend . . . to impose vicarious liability on municipalities for violations of federal civil rights by their employees." *Moor*, *supra*, 411 U.S. at 710 n.27, 93 S.Ct. at 1797, 36 L.Ed.2d at 610 n.27. Judge Tuttle's opinion trivializes those decisions. Surely *Monroe* and *Moor* represent more than a rule of artful pleading — name the city as defendant and one is barred from access to the public treasury; name city officials as defendants and through a judgment against them condemn public funds.

The majority gloss over the far-reaching implications of their action by noting that in *Monroe* "the Court seemed not the least concerned about whether substantial damages against the police officers of the City of Chicago would be paid only out of the pockets of the individual officers or out of appropriations made by the city government, or by their insurers." I agree that in cases where an individual's abuse of his authority is alleged a municipality's decision to indemnify or insure its employees is a question that does not concern us. Such payments could be viewed as part of the consideration a city pays for its officers' services. We would not pay attention to them in passing on the officers' personal liability, just as we would

ordinarily not consider whether the official had taken out his own liability insurance policy. In a case like the present one, however, the question of who it is intended ultimately will pay is crucial, because it raises the possibility that a jurisdictional bar Congress intended to erect will be evaded. There is quite a difference between payment by the city that is voluntarily undertaken as a form of compensation, or for other reasons, and involuntary payment by the city that is inherent in the nature of the plaintiffs' claim.

The Supreme Court in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), was faced with an effort similar to the one undertaken in the present case. In *Edelman* plaintiffs sought, *inter alia*, to obtain welfare benefits wrongfully withheld by the State of Illinois. To escape the state's Eleventh Amendment defense, plaintiffs named individual state officials as defendants. The Supreme Court, quoting from *Rothstein v. Wyman*, 467 F.2d 226 (CA2, 1972), *cert. denied*, 411 U.S. 921, 93 S.Ct. 1552, 36 L.Ed.2d 315 (1973), rejected this:

It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state.

...

It is one thing to tell the Commission of Social Services that he must comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs he administers. It is quite another

thing to order the Commissioner to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force. *Id.*, at 236-237 (footnotes omitted).

415 U.S. at 665, 94 S.Ct. at 1356, 39 L.Ed.2d at 673-674. If the interpretation of § 1983 set forth in *Monroe* and *Moor* "is to be conceived of as having any present force," then the fiction adopted in the present case must be rejected. Since *Edelman* was an Eleventh Amendment case and our present inquiry is statutory, I make no contention that *Edelman* "expends" *Monroe*.¹⁶ What it does do is to remind us that damage suits purporting to be against officers may in reality be suits against the government itself and that, when this is so, courts do not put on blinders to avoid seeing what is apparent.

As Judge Tuttle points out, we and other courts, post-*Kenosha*, have held that § 1983 actions can proceed against individual officers as parties defendant for injunctive relief, despite the fact that the ultimate judgment would "surely be felt by the city." *United Farmworkers of Florida Housing Project, Inc.*, *supra*. See, e. g., *Gresham v. Chambers*, 501 F.2d 687 (CA2, 1974); *Harper v. Kloster*, 486 F.2d 1134 (CA4,

¹⁶ I agree with the majority that neither municipalities nor their officers are wholly immune from suits for damages in federal courts. The only issue before us is the scope of § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3).

1973);¹⁷ *Cason v. City of Jacksonville*, 497 F.2d 949 (CA5, 1973); *Bramlet v. Wilson*, 495 F.2d 714 (CA8, 1974); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (CA9, 1974). See also *Edelman v. Jordan*, *supra*, 415 U.S. at 675, 94 S.Ct. at 1361, 39 L.Ed.2d at 679-80 (dictum). *Kenosha* does not, however, foreclose any and all distinctions between these injunction suits and suits for such monetary relief as pension refunds. In *Kenosha* the Court said:

We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe*, "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, . . . they are outside of its ambit for purposes of equitable relief as well as for damages.

412 U.S. at 513, 93 S.Ct. at 2226, 37 L.Ed.2d at 116 (citations omitted). Manifestly, this language, by its terms, merely precludes distinctions based on the relief sought when "municipal corporations" are the defendants. The problem before us is different: when a complaint names a city official as the defendant, what claims for relief should be treated as analytically distinct from claims against the municipality, and what

¹⁷ Judge Tuttle's reliance on *Harper* is misplaced. In *Harper* the plaintiffs sought declaratory and injunctive relief only. No attempt was made by the plaintiffs in that case to obtain public funds.

claims should be rejected as subterfuges that contravene the exemption from § 1983 announced in *Monroe*?

It would appear that the courts' willingness to take § 1983 jurisdiction in injunction suits against officers has stemmed from the well-established fiction of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under that doctrine, a state official who seeks to enforce an unconstitutional act is to that extent "stripped of his official or representative character and is subjected in his person to the consequence of his individual conduct." *Id.* at 160, 28 S.Ct. at 454, 52 L.Ed. at 729. The case stands as a familiar cornerstone of our legal system, and one can readily understand why the courts in § 1983 cases have had no qualms about distinguishing between a city and its officials in the injunction context. See *Ybarra v. City of Town of Los Altos Hills*, *supra*, at 252-53. At the same time, although these courts have sometimes stated broadly that named city officials may be sued under § 1983, Judge Tuttle points to no decision sustaining an award from municipal funds by means of a suit against municipal officers.¹⁸

¹⁸ *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92 (CA5, 1974), involved a § 1983 action by a school teacher to obtain damages and reinstatement after he had been wrongfully discharged from his teaching position in violation of his constitutional rights. The District Court awarded damages but denied reinstatement. On appeal this court held that the District Court had denied reinstatement for improper reasons and therefore the District Court on remand should "fully reconsider" the appropriate remedy. This court further held that the defendant Texas school district, which is "in the nature of a municipality," was immune from suit under *Monroe-Kenosha*. The named school officials, however, were found to be proper defendants. Although the per curiam opinion is somewhat ambiguous, the conclusion that jurisdiction is proper as to the named officials may well have referred only to the remedy of reinstatement to be considered on remand. Such equitable non-monetary relief against officials is of

The distinction between an injunction against city officials and one against the city itself is a commonplace and sometimes may have real-life consequences. It may mean, for example, that the relief granted against one official will not bind his successor. See *United Farmworkers of Florida Housing Project, Inc.*, *supra*, at 802 n.3.; cf. *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 622, 94 S.Ct. 1323, 1334, 39 L.Ed.2d 630, 646 (1974); *Spomer v. Littleton*, 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974). The line drawn by the majority is not only unprecedented; it is a pleading device and nothing more, inasmuch as the pension fund Trustees are nominal defendants from whose personal assets a recovery is not seriously contemplated.

The action against the Board of Trustees of the Pension Fund, as a Board, should be dismissed. The action against the individual members of that Board should be dismissed insofar as it seeks monetary relief. The action against the individual Trustees for declaratory and injunctive relief, however, is maintainable. With respect to that relief, I reach the merits and concur in Part II of Judge Tuttle's opinion.

course permissible. The citation in *Sterzing*, 496 F.2d at 93, n.2., to *United Farm Workers of Florida Housing Project*, *supra*, supports jurisdiction only to this extent. Insofar as the decision may permit the award of monetary damages, it would appear that the money would have had to come from the pockets of the individual defendants rather than the school district. The decision expresses no approval of employing the defendant officials as tools to reach into the school district fisc.

APPENDIX B

William J. WARNER, Jr., et al., etc.,
Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF the POLICE PENSION
FUND OF the CITY OF NEW ORLEANS, and its
members, Capt. Alvin H. Rankin, et al.,
Defendants-Appellees.

Raymond MUZQUIZ et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN ANTONIO et al.,
Defendants-Appellees.

Nos. 74-2303, 74-3177.

United States Court of Appeals,
Fifth Circuit.

Dec. 9, 1975.

Appeal from the United States District Court for the
Eastern District of Louisiana, Alvin B. Rubin, Judge.

Appeal from the United States District Court for the
Western District of Texas, Thomas J. Clary, Judge, sit-
ting by designation.

Before BROWN, Chief Judge, WISDOM, GEWIN,
BELL, THORNBERRY, COLEMAN, GOLDBERG,
AINSWORTH, GODBOLD, DYER, MORGAN,
CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the
Court's own motion, having determined to have these
cases reheard en banc,

It is ordered that these causes shall be consolidated
and reheard by the Court en banc with oral argument
on a date hereafter to be fixed. The Clerk will specify a
briefing schedule for the filing of supplemental briefs.

William J. WARNER, Jr., et al., etc.,
Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF the POLICE PENSION
FUND OF the CITY OF NEW ORLEANS, and its
members, Capt. Alvin H. Rankin, et al.,
Defendants-Appellees.

No. 74-2303.

United States Court of Appeals,
Fifth Circuit.

Feb. 27, 1976.

Appeal from the United States District Court for the
Eastern District of Louisiana; Alvin B. Rubin, Judge.

Before BROWN, Chief Judge, TUTTLE, WISDOM,
GEWIN, BELL, THORNBERRY, COLEMAN,
GOLDBERG, AINSWORTH, GODBOLD, DYER,
MORGAN, CLARK, RONEY, GEE and TJOFLAT, Cir-
cuit Judges.

PER CURIAM:

This appeal presents the same jurisdictional issues as are involved in *Muzquiz v. City of San Antonio*, 5 Cir. 1976, ___ F.2d ___, today decided.

The trial court's order dismissing the complaint for want of § 1983 jurisdiction was proper for the reasons stated by us in *Muzquiz*.

Affirmed.

JOHN R. BROWN, Chief Judge (dissenting and concurring in part).

I dissent in part and concur in part as set forth in my opinion in *Muzquiz v. City of San Antonio*, 5 Cir. 1976, ___ F.2d ___ [No. 74-3177], decided this day.

TUTTLE, Circuit Judge, with whom WISDOM, GOLDBERG and MORGAN, Circuit Judges, join (dissenting).

I dissent from the decision in this case on the grounds stated by me in the dissent in *Muzquiz v. City of San Antonio, et al.*, 5 Cir. 1976, ___ F.2d ___, announced this day.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part).

I concur in part and dissent in part in accordance with the views set forth in my partial concurrence and partial dissent in *Muzquiz v. City of San Antonio*, ___ F.2d ___ (5 Cir. 1976), decided this day.

GODBOLD, Circuit Judge (concurring in part and dissenting in part).

I dissent in part and concur in part as set forth in my opinion in *Muzquiz v. City of San Antonio*, ___ F.2d ___ [No. 74-3177] (CA 5, 1976), decided this day.

Raymond MUZQUIZ et al.,
Plaintiffs-Appellants,

v.

CITY OF SAN ANTONIO et al.,
Defendants-Appellees.

No. 74-3177.

United States Court of Appeals,
Fifth Circuit.

Feb. 27, 1976.

Appeal from the United States District Court for the Western District of Texas

Before BROWN, Chief Judge, TUTTLE, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.

DYER, Circuit Judge:

Former San Antonio policemen and firemen filed this class action against the Pension Fund Board of Trustees and its individual members seeking damages and refunds of the amounts they obligatorily contributed to a pension fund during their employment but which they were barred from receiving after their separation under Article 6243f, § 19, Vernon's Texas Civil Statutes.¹ They raised a myriad of con-

¹ The Act provides in pertinent part:

"[N]o member of either of said Departments or of said Fund shall ever be entitled to any refund from said Fund on account of the money deducted from that amount of their pay . . . which money is in itself declared to be public money, and the property of said Fund for the benefit of the members qualifying for benefits, and their beneficiaries."

stitutional challenges to the no-refund provisions of the statute. The district court granted summary judgment for the defendants. A panel of this Court, finding that the no-refund provisions of Article 5243f were reasonable and constitutional, affirmed on the merits.²

The Court took this case en banc because it posed questions of jurisdictional importance in the ever burgeoning area of relief sought under 42 U.S.C.A. § 1983.³ Two basic questions are presented. First, is the Board of Trustees of the Pension Fund a "person" and therefore suable under Section 1983? Second, is there jurisdiction over the individual members of the Board of Trustees to require them to cause payments from the fund to be made to the plaintiffs as restitution for the money paid into the fund?⁴ We answer both questions in the negative.

I.

In his dissent to the panel opinion, Judge Godbold adopted the rationale underlying the grant of immunity to cities, *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; *Kenosha v. Bruno*, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109, to the governmental entity here involved, the Board of Trustees of the Pension Fund, and concluded that the Board was not a "person" within the contemplation of Section 1983. We agree with the reasons undergirding this holding and without iterating them, we approve and adopt them as the opinion of the Court en banc.

² The facts and issues are fully stated in the panel opinion, *Muzquiz v. City of San Antonio*, 5 Cir. 1975, 520 F.2d 993.

³ For like jurisdictional reasons the Court also considered en banc *Warner v. Bd. of Tr. of Pol. Pen. Fund, etc.*, 5 Cir. 1975, 522 F.2d 1384, this day decided, ____ F.2d ____.

⁴ On oral argument plaintiffs withdrew their claims for damages.

II.

With respect to the court's jurisdiction over the individual members of the Board of Trustees, again we agree with Judge Godbold's dissent, and his conclusion that there is a want of jurisdiction under Section 1983 to entertain plaintiffs' suit seeking an accounting, restitution and refunds, all of which "stri[k]e directly for the pocket of the Pension Fund." *Muzquiz* at 1007.⁵ We only wish to make clear the basis for this decision.

The panel opinion argues that it is incongruous to hold that the individual board members are "persons" within the meaning of § 1983 when some forms of relief, such as money damages, are sought, and at the same time to hold that the board members are not "persons" when other forms of relief, such as restitution, is sought. But this is not the basis of our decision. We do not hold that the status of the board members as "persons" is variable, dependent upon the relief sought. Rather, we hold that this is a suit not against the nominal defendants, the individual board members who are "persons", but instead is a suit against an unnamed, though very real, party defendant, the Pension Board itself, an entity which, as we have held previously, is not a "person". Therefore, § 1983 jurisdiction must fail.

⁵ As we noted earlier, on oral argument plaintiffs withdrew their demand for damages. If this were a suit seeking damages against the individual members of the Board for their alleged deprivations of a constitutional right, jurisdiction under § 1983 would exist. In that instance, plaintiffs would not be using the members of the Board as conduits to reach the Fund. Plaintiffs, of course, would have to prove their case and the board members could raise valid defenses. See *O'Connor v. Donaldson*, 1975, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396; *Wood v. Strickland*, 1975, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214.

In form, plaintiffs seek against the individual members of the board a mandatory injunction ordering the individual members to refund past contributions to the fund. However, in substance, this is nothing more than restitution against the fund itself. If we allowed this action to proceed, then the bar which has been created by the judicial interpretations of § 1983 would be effectively eliminated, for any action which seeks restitution against a "nonperson" may be framed in terms of a mandatory injunction against the officials responsible for the fund from which restitution is sought. The congressional intent which impels the "nonperson" limitation cannot be so lightly construed. The detailed analysis of Judge Godbold's dissent fully supports this position.

We take issue with only one aspect of that dissent. Judge Goldbold concludes that the action against the individual members of the board should be dismissed insofar as it seeks monetary relief in the form of restitution. However, he also concludes that the action against the individual members is maintainable, insofar as it seeks declaratory and injunctive relief. The declaratory and injunctive relief sought is a declaration that Article 6243f is unconstitutional, and an injunction against its enforcement. Article 6243f is prohibitory in nature, barring refunds of monies previously paid into the fund. A declaration that it is unconstitutional, or an injunction against its enforcement, is in substance a determination of plaintiffs' entitlement to restitution from the fund itself. This determination, as we have held, is barred under § 1983 because of the "nonperson" status of the fund's Board of Trustees.

Thus, we conclude that under the peculiar facts of this case, either a mandatory injunction directed

against the individual members of the board, or injunctive and declaratory relief with respect to the statute is tantamount to a money judgment for restitution against the fund, an entity against which relief may not be directed under the court's § 1983 jurisdiction.

III.

Since jurisdiction fails, we do not reach the merits.

Affirmed.

JOHN R. BROWN, Chief Judge (dissenting and concurring in part).

With respect to the meaning of "person" under § 1983, I concur in Judge Tuttle's opinion.

With respect to the remedy against individual members of the Board of Trustees in either their personal or official capacities, I concur in the result in Part II of Judge Dyer's opinion for the Court. I also concur in the opinion except that I reserve the question as to declaratory orders or injunctions which do not have the operative effect of directing restitution of the public funds.

TUTTLE, Circuit Judge, with whom WISDOM, GOLDBERG and MORGAN, Circuit Judges, join (dissenting).

With deference I dissent. Apparently because of its concern with the "ever burgeoning area of relief sought under 42 U.S.C.A. § 1983" the court seems to me to have whittled down the clear statutory grant of civil

rights litigation under color of state law to little more than an empty promise. This is so because it is hard to conceive of a situation where a person acts under color of state law without being involved in a governmental type body.

It must be borne in mind that all we are doing is construing a statute. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Supreme Court has held that a municipal corporation is not a "person" within the contemplation of this statute. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). The Court has also held that a county is sufficiently like a municipality that it must also be accounted to be a non-person under this section. *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).

The Court has not held that a true "person" cannot be sued merely because by means of the suit the public fisc would be reached through the court's equity powers. Such a holding, as in my judgment is the deci-

sion of the court here, flies in the face of a literal reading of the language: "Every person, who, under color of any statute . . . shall be liable . . . in . . . [a] suit in equity, or other . . . proceeding for redress."

The error which, respectfully, I think the court has made here is that it treats § 1983 as a statute granting or creating some sort of immunity to a municipal corporation. It does nothing of the sort. It merely does not include a municipal corporation within the word "person." The clearest evidence of the Supreme Court's understanding of this basic fact is the treatment it gave to the case of *Moor v. County of Alameda*. There the Court held that a suit could not be maintained against Alameda County in California because the County was not a "person." The Court did not stop there, however. It gave instead what might to some be considered a very liberal construction of the word "citizen" in the diversity jurisdiction clause¹ in order to permit the action against Alameda County to proceed on the theory that it was a citizen of the State of California.

In its use of the word "person" in § 1983 Congress did not intend for it to have an arcane or restricted meaning to be determined on the basis of the effect the created cause of action might have on the public moneys of a municipality. The majority writes a new definition which says a true live and breathing person who is a trustee of a fund created by a municipality is

¹ "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000 . . . and is between —

(1) citizens of different States."

28 U.S.C. § 1332(a)(1).

not a "person" because the Congressional policy is not to permit a suit to be maintained against the city itself.

This approach is even less understandable to me in light of a post-*Kenosha* case of the Supreme Court. In *Bradley v. School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Court permitted a suit under § 1983 to require the payment of an attorney's fee to be charged against the Board itself. I would suppose that no member of this Court would think this board of trustees of a pension fund would be less a "person" than the Board of Education of the City of Richmond. See *Davis v. Bd. of School Commissioners of Mobile County*, 526 F.2d 865 (5th Cir. 1976), in which a panel of this Court recognized the identical right for recovery of attorneys' fees against a board of education.

Pretermittting entirely the question whether the "Pension Fund Board of Trustees" would qualify as a person, I have no doubt but that the members of this Board, sued in their individual capacities and as trustees, are persons. See *Burt v. Bd. of Trustees of Edgefield Co. School Dist.*, 521 F.2d 1201, 1205 (4th Cir. 1975). This is so even though, by suing them, the plaintiff if successful might be able, through equity, to get at the funds they are administering.² Such was the case

² See *Incarcerated Men of Allen Co. Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974), in which the court said:

"A federal court may, however, award equitable relief against local officials, even though it will have a severe impact on local governmental funds, without infringing the policies behind § 1983. See *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955); *Northcross v. Board of Education*, 489 F.2d 19 (6th Cir. 1973);" (Emphasis in original) 507 F.2d 288.

I see no valid distinction between the impact on local funds caused by jail reform suits, reinstatement and back pay suits, school desegregation suits and the impact on the pension fund that a restitutionary award here-would cause.

when the Supreme Court carved out the exception of the Eleventh Amendment (a much more significant result, since the Constitution was involved, rather than the construction of a statute) in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

I would hold that the trial court had jurisdiction of this case under § 1983.

THORNBERRY, Circuit Judge (concurring in part and dissenting in part),

I fully concur in Part I of Judge Dyer's opinion, agreeing with the conclusion that the San Antonio Pension Fund Board of Trustees is not a "person" subject to suit under 42 U.S.C. § 1983.

I find, however, that I am unable to concur in Part II of that opinion, which deals with the amenability of individual Board members to § 1983 suit. Judge Tuttle's indisputably correct observation that such individuals are "persons" under any reasonable definition of that term alone seems to me sufficient to conclude the issue. However certain the Court may be that an action is, "in reality", one directed at a governmental non-person, the fact is that the named defendants, and the ones against whom equitable relief would run, are persons. If Congress intended the statute to be construed other than in accordance with its natural and literal meaning, it could have given — or could now give — some objective basis for that conclusion. There is none.

Moreover, I seriously doubt the practical ability of the Courts to determine when an action falls within the

ambit of the Court's decision in this case. In a decision that apparently is not overruled by the Court today, we held that individual government officials may be the object of injunctive relief under § 1983, even though that relief would have much the same effect as an injunction directed to the government body itself. *United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5 Cir. 1974). Indeed, in prison cases and school cases, to name only a couple of examples, injunctive relief against governmental officials will as clearly require expenditures by those officials from the applicable government coffers as in the action before us. We have also upheld awards of equitable monetary relief directed against individual officials despite the fact that the money would ultimately be paid, through formal or informal indemnification arrangements, by the governmental "non-person" involved. *E. g.*, *Gates v. Collier*, 489 F.2d 298 (5 Cir. 1973), *vacated and remanded on other grounds*, 522 F.2d 81 (5 Cir. 1975) (en banc); *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319 (5 Cir. 1970).

I do not mean to suggest that it is impossible to draw distinctions between such cases and the one before us today. But I do contend that these cases foreclose a distinction based upon the relatively clear and logical basis of whether the relief sought will ultimately come from the individual who is the immediate subject of the applicable order or the governmental entity with which he is associated. Instead, the Courts will be forced to wrestle, as has this Court, with the vague and elusive question of whether an action is "in reality" or "in substance" one against a person or a non-person. It seems to me that, at least as long as the earlier decisions mentioned remain good law, attempts to

thwart indirect § 1983 actions against governmental "non-persons" will cause the Courts great difficulty and result in decisions that are lacking in both consistency and logic.

For these reasons, I dissent from Part II of the Court's opinions.

GODBOLD, Circuit Judge (concurring in part and dissenting in part).

I am unable to fully join in Judge Dyer's opinion despite the fact that it adopts in large part the dissenting opinion that I filed to the panel opinion. I disagree with the holding with respect to declaratory and injunctive relief against the individual Trustees. I now see this issue more clearly, and hopefully can discuss it more clearly, than in my earlier dissent. To the extent that anything said in the original dissent is broader than what is here said, I recede from it.

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), proscribed § 1983 suits against cities for damages. It did not decide whether its proscription applied to forms of relief other than damages. *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), answered that question by holding that in a suit against a city the *Monroe* rule applies to injunctive and declaratory relief sought against the city. *Kenosha* was not concerned with whether injunctive and declaratory relief is available under § 1983 against public officers. Since *Kenosha*, both the Supreme Court and this court have approved injunctions issued against public officers under § 1983. *Goss*

v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (school officials); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (prison officials); *United Farmworkers v. City of Delray Beach*, 493 F.2d 799 (CA 5, 1974) (municipal officials).

Is injunctive and declaratory relief against public officials, ordinarily available under § 1983, unavailable if the relief will have some financial impact upon the public fisc? The answer to this question lies in recognizing that *Monroe*, and its roots in the Civil Rights Acts, protect the municipal treasury against damages. Also, of course, injunctive and declaratory relief against a public officer is not available under § 1983 if it is a sham device to reach into the public treasury in pursuit of a claim for damages. But dollar impact on the public treasury resulting from bona fide equitable or declaratory relief that requires public officers to make restitution out of the public treasury is another matter. *Monroe* did not deal with such claims. *Kenosha* did not broaden the policy implemented by *Monroe* into a broader policy of insulating public funds from the impact of nondamage claims asserted under § 1983.

Arguably a city treasury does not have full title to funds that it possesses but in equity or under principles of restitution is bound to turn over to others property entitled to them. Thus it might be said that such funds are not part of the public fisc at all. But one need not embark on the intricacies of property concepts. More fundamentally, *Monroe* protects the treasury from damages in the narrow sense, not from non-damage claims.

We recognized and followed this distinction in *Harkless v. Sweeny Ind. School Dist.*, 427 F.2d 319 (CA 5, 1970), *cert denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971). In Part II of that case we held that *Monroe* did not prohibit § 1983 suits against public officials for equitable relief, and in Part III we held that turning over to improperly discharged teachers their back pay was an integral part of the equitable remedy of reinstatement. These parts of *Harkless* remain viable, unaffected by *Kenosha*.¹

The ultimate result in this case is an overreaction by the Court en banc. The plaintiffs sought restitution, assorted equitable relief, and damages of almost every kind and variety within the ingenuity of a legal draftsman. The panel opinion, ignoring the damage claims, characterized the suit as an "action seeking a refund" and upheld jurisdiction, making no distinction between suits seeking damages from the public treasury and suits not for damages that nevertheless might have a dollar impact on the fisc. This left open the possibility that in future cases judgments for damages might be entered against individual city officers and sought to be enforced against public treasuries. To close off this end run around *Monroe* the court en banc, while recognizing that the plaintiffs now disclaim damages, has proceeded to give to *Monroe* wider scope than that case was intended to have.

¹ Part I of *Harkless*, in which we held that a suit could be maintained against the School District for equitable relief has, of course, been supplanted by *Kenosha*. See *Adkins v. Duval County School Board*, 511 F.2d 690, 692 (CA 5, 1975).

In summary, I concur in the holding that the Pension Fund is not a person and in the implicit holding that § 1983 proscribes suit against the individual Trustees for damages. I dissent from the holding that § 1983 also proscribes suit against the individual officers for restitution and other equitable relief not in the nature of damages.